NEGOTIATED RULEMAKING ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

H.R. 743

NEGOTIATED RULEMAKING ACT OF 1989

MAY 3, 1989

Serial No. 9

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

CONTENTS

NEGOTIATED RULEMAKING ACT OF 1989

WEDNESDAY, MAY 3, 1989

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:04 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Harley O. Staggers, Craig T. James, Lamar S. Smith, and Chuck Douglas.

Also present: Janet Potts, chief counsel; Belle Cummins, assistant counsel; Cynthia Blackston, chief clerk; and Roger T. Fleming, minority counsel.

Mr. FRANK. The hearing of the Subcommittee on Administrative Law and Governmental Relations will now come to order. We are going to have a hearing today, our second on the negotiated rulemaking issue. The bill before the subcommittee is H.R. 743.

[The bill, H.R. 743, follows:]

101ST CONGRESS
1ST SESSION

H. R. 743

To establish a framework for the conduct of negotiated rulemaking by Federal agencies.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1989

Mr. PEASE introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To establish a framework for the conduct of negotiated rulemaking by Federal agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Negotiated Rulemaking Act of 1989".

FINDINGS

SEC. 2. The Congress makes the following findings:

(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act.

(2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.

(3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.

(4) Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking.

(5) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

(6) Agencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under the Federal Advisory Committee Act (5 U.S.C. App.).

Several agencies have successfully used negotiated rulemaking. The process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking.

NEGOTIATED RULEMAKING PROCEDURE

SEC. 3. (a) Chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER IV—NEGOTIATED RULEMAKING PROCEDURE

"§ 581. Purpose

"The purpose of this subchapter is to establish a framework for the conduct of negotiated rulemaking, consistent with section 553 of this title, to encourage agencies to use the process when it enhances the informal rulemaking process. Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.

"§ 582. Definitions

"For the purposes of this subchapter the term—

"(1) 'agency' has the same meaning as in section 551(1) of this title;

"(2) 'consensus' means unanimous concurrence among the interests represented on a negotiated rule-

making committee established under this subchapter, unless such committee—

"(A) agrees to define such term to mean a general but not unanimous concurrence; or

"(B) agrees upon another specified definition;

"(3) 'convenor' means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking;

"(4) 'facilitator' means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule;

"(5) 'interest' means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner;

"(6) 'party' has the same meaning as in section 551(3) of this title;

"(7) 'person' has the same meaning as in section 551(2) of this title;

"(8) 'negotiated rulemaking committee' or 'committee' means an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act (5 U.S.C. App.) to

consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

"(9) 'rule' has the same meaning as in section 551(4) of this title; and

"(10) 'rulemaking' has the same meaning as in section 551(5) of this title.

"§ 583. Determination of need for negotiated rulemaking committee

"(a) An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether—

"(1) there is a need for a rule;

"(2) there are a limited number of identifiable interests that will be significantly affected by the rule;

"(3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who—

"(A) can adequately represent the interests identified under paragraph (2); and

"(B) are willing to negotiate in good faith to reach a consensus on the proposed rule;

"(4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

"(5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

"(6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and

"(7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

"(b)(1) An agency may use the services of a convenor to assist the agency in—

"(A) identifying persons who will be significantly affected by a proposed rule; and

"(B) conducting discussions with such persons to identify the issues of concern to such persons, and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.

"(2) The convenor shall report findings and may make recommendations to an agency. Upon request of the agency,

the convenor shall ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule. The report of the convenor and any recommendations shall be made available to the public upon request.

"§ 584. Publication of notice

"(a) If, after considering the report of a convenor or conducting an assessment, an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register a notice which shall include—

"(1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

"(2) a description of the subject and scope of the rule to be developed, and the issues to be considered;

"(3) a list of the interests which are likely to be significantly affected by the rule;

"(4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

"(5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

"(6) a description of administrative support for the committee to be provided by the agency, including technical assistance;

"(7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

"(8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

"(b) Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice under subsection (a)(4) may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule. Each application or nomination shall include—

"(1) the name of the applicant or nominee and a description of the interests such person shall represent;

"(2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;

"(3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and

"(4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.

"§ 585. Establishment of committee

"(a) The agency shall provide for a period of at least 30 calendar days for the submission of comments and applications under section 584.

"(b)(1) If after considering comments and applications submitted under section 584, the agency determines that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee. In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act (5 U.S.C. App.) with respect to such committee, except as otherwise provided in this subchapter.

"(2) If after considering such comments and applications, the agency decides not to establish a committee, the agency shall promptly publish notice of such decision and the reasons therefor in the Federal Register.

"(c) The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. Each committee shall include at least one individual representing the agency.

"(d) The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance.

"§ 586. Conduct of committee activity

"(a) Each negotiated rulemaking committee established under this subchapter shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule.

"(b) The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of such committee with the same rights and responsibilities as other members of such committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

"(c)(1) Notwithstanding section 10(e) of the Federal Advisory Committee Act (5 U.S.C. App.), an agency may nominate either a person from the Federal Government or a person from outside the Federal Government to serve as a facilitator for the negotiations of the committee, subject to the approval by consensus of the committee. If the committee

does not approve the nominee of the agency for facilitator, the agency shall submit a substitute nomination. If a committee does not approve any nominee of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee.

"(d) A facilitator approved or selected by a negotiated rulemaking committee shall—

"(1) chair the meetings of the committee in an impartial manner;

"(2) impartially assist the members of the committee in conducting discussions and negotiations; and

"(3) manage the keeping of minutes and records as required under section 10 (b) and (c) of the Federal Advisory Committee Act (5 U.S.C. App.), except that any personal notes and materials of the facilitator or of the members of a committee shall not be subject to section 552 of this title.

"(e) A negotiated rulemaking committee established under this subchapter may adopt procedures for the operation of the committee. No provision of section 553 of this title shall be applicable to the procedures of a committee.

"(f) If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall

transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, such committee shall transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in a report any other information, recommendations, or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations, or materials.

"(g) In addition to the report specified by subsection (f), a committee shall submit to the agency the records required under section 10 (b) and (c) of the Federal Advisory Committee Act (5 U.S.C. App.).

"§ 587. Termination of committee

"A negotiated rulemaking committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date or the agency, after consulting the committee, or the committee itself specifies an alternate termination date.

"§ 588. Services, facilities, and payment of committee member expenses

"(a)(1) An agency may employ or enter into contracts for the services of an individual or organization to serve as a convenor or facilitator for a committee under this subchapter,

or may use the services of a government employee to act as a convenor or a facilitator for a committee.

"(2) An agency shall determine whether a person under consideration to serve as convenor or facilitator of a committee under paragraph (1) has any financial or other interest that would preclude such person from serving in an impartial and independent manner.

"(b) For purposes of this subchapter, an agency may use the services and facilities of other Federal agencies and public and private agencies and instrumentalities with the consent of such agencies and instrumentalities, and with or without reimbursement to such agencies and instrumentalities, and may accept voluntary and uncompensated services without regard to the provisions of section 1342 of title 31.

"(c) Members of negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an agency may, in accordance with section 7(d) of the Federal Advisory Committee Act (5 U.S.C. App.), pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if—

"(1) such member certifies a lack of adequate financial resources to participate in the committee; and

"(2) the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.

"(d) A member's receipt of funds under this section or section 589 shall not conclusively determine the purposes of sections 202 through 209 of title 18 whether that member is an employee of the United States Government.

"§ 589. Role of the Administrative Conference of the United States

"(a) An agency may consult with the Administrative Conference of the United States or other public or private individuals or organizations for information and assistance in forming a negotiated rulemaking committee and conducting negotiations on a proposed rule.

"(b) The Administrative Conference of the United States, in consultation with the Federal Mediation and Conciliation Service, shall maintain a roster of individuals who have acted as or are interested in serving as convenors or facilitators in negotiated rulemaking proceedings. The roster shall include individuals from government agencies and private groups, and shall be made available upon request. Agencies may also use rosters maintained by other public or private individuals or organizations.

"(c)(1) The Administrative Conference of the United States shall develop procedures which permit agencies to

obtain the services of such convenors and facilitators on an expedited basis.

"(2) Payment for convenor or facilitator services shall be made by the agency using the services, unless the Chairman of the Administrative Conference agrees to pay for such services under subsection (f).

"(d)(1) The Administrative Conference of the United States shall compile and maintain data related to negotiated rulemaking and shall act as a clearinghouse to assist agencies and parties participating in negotiated rulemaking procedures.

"(2) Each agency engaged in negotiated rulemaking shall provide to the Administrative Conference of the United States a copy of any reports submitted to the agency by negotiated rulemaking committees under section 585 and such additional information as necessary to enable the Administrative Conference of the United States to comply with this subsection.

"(3) The Administrative Conference of the United States shall review and analyze the reports and information received under this subsection and shall transmit a biennial report to the Governmental Affairs Committee of the Senate and the appropriate committees of the House of Representatives that—

"(A) provides recommendations for effective agency use of negotiated rulemaking; and

"(B) describes the nature and amounts of expenditures made by the Administrative Conference of the United States to accomplish the purposes of this subchapter.

"(e) The Administrative Conference of the United States is authorized to provide training in negotiated rulemaking techniques and procedures for Federal personnel either on a reimbursable or nonreimbursable basis. Such training may be extended to private individuals on a reimbursable basis.

"(f) The Chairman of the Administrative Conference of the United States is authorized to pay, upon request of an agency, all or part of the expenses of establishing a committee and conducting a negotiated rulemaking. Such expenses may include, but are not limited to—

"(1) the costs of convenors and facilitators;

"(2) the expenses of committee members determined by the agency to be eligible for assistance under section 588(c); and

"(3) training costs.

Determinations with respect to payments under this section shall be at the discretion of such Chairman in furthering the use of negotiated rulemaking by Federal agencies.

"(g) The Administrative Conference of the United States may apply funds received under section 575(c)(12) of this title to carry out the purposes of this subchapter.

"§ 590. Judicial review

"Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule which is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subjected to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.".

(b) The table of sections for chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER IV—NEGOTIATED RULEMAKING PROCEDURE

"Sec. 581. Purpose.
"Sec. 582. Definitions.
"Sec. 583. Determination of need for negotiated rulemaking committee.
"Sec. 584. Publication of notice.
"Sec. 585. Establishment of committee.
"Sec. 586. Conduct of committee activity.
"Sec. 587. Termination of committee.
"Sec. 588. Services, facilities, and payment of committee member expenses.
"Sec. 589. Role of the Administrative Conference of the United States.
"Sec. 590. Judicial review.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 4. To carry out this Act, and notwithstanding section 576 of this title, there are authorized to be appropriated to the Administrative Conference of the United States not in

excess of $500,000 for each of the fiscal years 1990, 1991, and 1992.

SUNSET AND SAVINGS PROVISIONS

SEC. 5. (a) Subchapter IV of title 5, United States Code, is repealed, effective 6 years after the date of the enactment of this Act.

(b) That portion of the table of sections relating to subchapter IV for chapter 5 of title 5, United States Code, is repealed, effective 6 years after the date of the enactment of this Act.

(c) Notwithstanding the repeal under this section, the provisions and amendments of this Act shall continue in effect after 6 years after the date of the enactment of this Act with respect to then pending negotiated rulemaking proceedings which, in the judgment of the agencies which are convening or have convened such proceedings, require such continuation, until such negotiated rulemakings terminate pursuant to this Act.

This is a subject which our colleague, Mr. Pease, has been very interested in, and has done a lot of excellent work on.

On the other side of the Capitol, Senator Levin has been very interested in this. We were able to broach the subject first last year, but we had a pretty crowded subcommittee agenda. That agenda is less crowded this year, and if the subcommittee members are so inclined, we will probably be able to legislate on this issue this year. I think the question then becomes how we will do that.

We will begin with our colleague, Mr. Pease, and we ask first, Mr. James, whether you have any opening statement.

Mr. JAMES. I welcome the witnesses here. I would like to stay and hear the testimony, but I will not be able to because of a conflict. Thank you for coming and offering the testimony. I will read the record and the statements at a later time; those that I have not already read, but thank you so much for being here.

Mr. FRANK. I appreciate that. As some of those familiar with this place know, this is the time of year when it is hardest to find a free moment, because there are so many conflicting efforts. I think, having had one hearing, as we have this second one, members of the subcommittee will be familiar enough so that by the summer, we will be able to talk about what we're going to do.

We'll begin with our colleague, Mr. Pease.

STATEMENT OF HON. DONALD J. PEASE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. PEASE. Mr. Chairman and Mr. James, thank you very much. I appreciate the opportunity to testify. As you have noted——

[Whereupon, at 10:06 a.m., a power cord failure interrupted the recording until 10:34 a.m.]

[The prepared statement of Mr. Pease follows:]

STATEMENT OF THE HONORABLE DON J. PEASE

HOUSE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE LAW

H.R. 743 -- THE NEGOTIATED RULEMAKING ACT OF 1989

MAY 3, 1989

Thank you, Mr. Chairman, for inviting me to testify on a bill to authorize the use of negotiated rulemaking by federal agencies.

As you know, administrative regulations often become the object of protracted litigation. These court battles tend to be time-consuming, costly, and often unnecessary. In certain cases, agencies could make rules more fairly and efficiently through direct negotiations between the various interested parties.

As an alternative to the traditional rule making process, my bill would encourage negotiation and consultation among groups that are often at odds with one another, such as government, industry, and labor. Various agencies have tried negotiated rulemaking with reasonable success. I will leave it to the experts testifying later to detail the track record for negotiated rules.

The legislation would not force the agencies to do anything they do not want to do. Moreover, I do not intend that agencies employ negotiated rulemaking to establish fundamental policies or stray from statutory intent. My primary interest is to make negotiated rulemaking available to the agencies as an option, for use when appropriate.

I encourage this subcommittee to consider this bill seriously. It provides a modest opportunity to foster more harmonious, rational and efficient relations between the government and private parties. We ought to take advantage of it.

Thank you.

STATEMENT OF MARSHALL BREGER, CHAIRMAN,
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

[The prepared statement of Mr. Breger follows:]

TESTIMONY
OF
MARSHALL J. BREGER

Chairman
Administrative Conference of the United States

before the
Subcommittee on Administrative Law and Governmental Relations
Committee on the Judiciary
United States House of Representatives

on H.R. 743
"Negotiated Rule Making Act of 1989"

May 3, 1989

Introduction

Mr. Chairman and Members of the Subcommittee, my name is Marshall J. Breger and I am Chairman of the Administrative Conference of the United States. I am especially pleased to present the views of the Administrative Conference on H.R. 743, the "Negotiated Rule Making Act of 1989," because the process holds great promise for alleviating some of the inefficiency and unpleasantness about the way in which regulatory agencies have gone about the task of formulating rules.

This is my second opportunity to address the Subcommittee on the subject of negotiated rulemaking. In my testimony last year, I explained why the Administrative Conference has come to view the use of negotiations as an important procedural tool for resolving disputes that may arise in the context of agency rulemaking. In the private sector, it has long been accepted for parties to a dispute to engage in negotiation, mediation, and other so-called alternative means of dispute resolution. These alternative techniques often result in reduced litigation, less costly decisions more quickly arrived at that are also more acceptable to the parties, and an attitude of greater cooperation among the parties in future dealings. In this spirit, the Administrative Conference twice formally adopted recommendations that encourage agencies to use negotiated rulemaking (sometimes known as "reg-neg") in appropriate situations.[1]

These Conference efforts have encouraged a number of agencies to try to use negotiated rulemaking in a variety of situations--proceedings that generally have been selected and undertaken in accordance with the recommendations of the Conference. In addition, in 1988, Congress recognized the value of negotiating regulations by twice placing requirements in legislation that mandate use of reg-neg. In the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 (Public Law 100-297), the Department of Education is required to conduct a "modified negotiated rulemaking" on at least four key issues. In the Price-Anderson Amendments Act (Public Law 100-408), section 19 provides for negotiated rulemaking on indemnification of radiopharmaceutical licensees. Each of these statutes explicitly recognized Administrative Conference Recommendation 82-4 as the basis for conducting the negotiations. The Price-Anderson Amendments also required the Nuclear Regulatory Commission to select one or more convenors from a list recommended by the Administrative Conference. We believe the experience of the agencies that have used reg-neg clearly establishes the value of the procedure in appropriate circumstances.

Need for Legislation

The Administrative Conference has followed two tracks to encourage the use of negotiated rulemaking where appropriate. First, we encouraged agencies to consider reg-neg and many have done so notwithstanding the absence of any special authorizing or facilitating legislation. At the same time, we recommended that Congress enact legislation explicitly authorizing reg-neg and facilitating its use. H.R. 743 is a significant step in that direction.

It is reasonable to ask why we need new legislation if reg-neg is being used successfully by some agencies without it. The simple answer is that with the proposed legislation, more agencies are likely to use reg-neg, more often, more successfully. H.R. 743 will provide a needed spur to encourage the use of negotiated rulemaking, provide greater protections for the public, and make the process work better.

---

[1] Procedures for Negotiating Proposed Regulations, 1 C.F.R. §§ 305.82-4 and 85-5.

1. Legitimacy of the Process

Enactment of H.R. 743 would encourage use of reg-neg by those agencies that still have concerns about their authority to do so. Although at least 7 federal agencies have instituted negotiated rulemaking proceedings, other agencies are nevertheless reluctant to follow suit. Some are hesitant because they question whether they have the statutory authority to delegate the process of drafting a proposed rule to a committee. Or, they may question the implications of the Federal Advisory Committee Act for negotiated rulemaking. So, when an agency general counsel is asked for advice on whether the agency should use reg-neg, the wisest course may appear to be not to run any risk of having a court invalidate the procedure at some future date. I have attached to my testimony two examples of agency reluctance to try negotiated rulemaking in the absence of special legislation. In these circumstances, a statute would remove any doubt about agency authority.

The bill makes an important contribution by clarifying the applicability of the Federal Advisory Committee Act and the scope of judicial review. By doing so, it should alleviate some of the concerns of those now reluctant to accept the use of negotiated rulemaking because they believe they may be left out of the process or that their participation will make them less able to challenge an agency's rule in court. The bill would add a new section 590 to title 5 of the United States Code, which would establish the principle that a rule that is the product of negotiated rulemaking is not to be accorded any greater deference by a court than a rule resulting from conventional procedures. That section also contains an important provision to prevent increased litigation from challenges to agency actions relating simply to establishing, assisting, or terminating a negotiated rulemaking committee. At the same time, the section provides that there will be no narrowing of judicial review for an otherwise reviewable rule merely because it is the product of a negotiation process.

2. Establishing a Statutory Framework

H.R. 743 would require any agency using reg-neg to include in its process a core of procedural elements necessary to inform and protect the public. While an agency's successful use of reg-neg requires a degree of flexibility in adapting the basic principles of the procedure to the particular regulatory problem at hand, H.R. 743 provides a number of important procedural protections not currently required by law. In our view, such protections improve the fairness--and, equally important, the perception of fairness--of the process.

For example, publication of notices in the Federal Register would be required at certain points in the reg-neg procedure. For the first time, persons who believe they are significantly affected by a proposed rule but whose interests may not be adequately represented by others would have 30 days to apply for membership on the negotiating committee. The agency need not ultimately include on the committee everyone who applies, but--at least as we read the bill in light of the existing requirements of the Administrative Procedure Act, 5 U.S.C. § 555(e)--the agency must explain why requests have been denied. Also, use of a neutral mediator to facilitate negotiations is required and the committee is entitled to a voice in the selection of the facilitator. Under the bill, the agency would have to participate in the negotiations at a sufficiently senior level so as to maximize the likelihood of success, as well as to ensure that statutory requirements are met and that any agreement is basically fair.

Based on the experience of pioneering agencies such as the Environmental Protection Agency, the Department of Transportation, and the Occupational Safety and Health Administration, the bill strikes a good balance between the degree of formality required to protect the public and the flexibility needed to make the process work. Indeed, the bill contemplates further procedural improvements as agencies acquire more experience with negotiating rules, and the Administrative Conference would be required to submit periodic reports to Congress with further recommendations for effective use of reg-neg.

There is an old saw that the devil we know is better than the devil we do not know. I think this is one of the reasons why some individuals or groups with limited resources have expressed misgivings about negotiated rulemaking. Most of them can afford the time and money needed to draft and file comments in response to an agency's notice of proposed rulemaking. Moreover, they understand well how the conventional rulemaking process works. But they are worried they will lack the time and funds to participate effectively in a long, drawn-out negotiation, or they may be concerned they will be less effective in a negotiation with high-priced industry practitioners. In some respects, I think those are legitimate concerns. It will probably take a greater commitment of time and effort--including time away from the office--to participate in a reg-neg than it would take simply to prepare written comments. The tradeoff is that participation in reg-neg is more likely to produce the results they are trying to achieve.

When agencies issue proposed regulations, their staffs have already given considerable time and thought to the desired outcome. In reaching their preliminary conclusions, agency staffs quite often discuss the issues with the major groups or organizations most likely to be affected. Staffs are, in general, more likely to discuss these matters in advance with the large, well organized groups.

All parties enter a reg-neg on more or less an equal footing. Agencies can be expected to have some general ideas about desired outcomes, but the agency is not the sole decisionmaker at the bargaining table. Within the range of outcomes acceptable to the agency, the various interest groups as well as the agency try to achieve a consensus--unanimous concurrence on the entire agreement package among the interests represented (unless they agree to a definition that is less than unanimity). An impartial facilitator or mediator is selected, whose principal function is to help the negotiators achieve consensus. In my judgment, the smaller, less affluent participants are more likely to achieve at least partial satisfaction of their objectives in the negotiating climate fostered by reg-neg than they would under the more traditional practice of the drafting of proposed rules by agencies, followed by notice and comment.

Enactment of H.R. 743 would serve as a reference point for any future legislation in which Congress might want to require use of reg-neg. While we appreciate that Congress and agencies have recognized the usefulness of the technique, we are concerned that in the absence of a statutory framework such as that embodied in H.R. 743, each time an agency wants to use the technique, or Congress wants an agency to use reg-neg, a different procedure will be adopted. In fact, Congress has done that in the two instances cited above. The Hawkins-Stafford Amendments called for a "modified negotiated rulemaking process," waiving the applicability of the Federal Advisory Committee Act. The Price-Anderson Amendments did not address the Federal Advisory Committee Act, but did set forth a variant procedure whereby the convenor is to submit recommendations to the Nuclear Regulatory Commission if the negotiating committee does not reach a consensus.

In both cases, Congress instructed the agency to employ the procedures proposed by the Administrative Conference in our 1982 recommendation. Neither of the statutory schemes, I might observe, took note of Conference Recommendation 85-5, which refined our 1982 recommendation on the basis of experience with reg-neg to date. Because Congress modified the regulatory negotiation process in the legislation, the agency had to adapt the Conference's 1982 recommendation to the statutory scheme.

Variations in procedure each time Congress decides to have an agency use negotiated rulemaking can be confusing to agency officials and to the public. In addition, the practice of "reinventing the wheel" is not likely to make use of the best information available on utilizing reg-neg procedures. It is even possible that numerous statutory variations on the basic elements of negotiated rulemaking will itself lead to unnecessary litigation.

We can appreciate that, on occasion, Congress may want to tailor negotiated rulemaking to particular circumstances, where substantive considerations might make special procedures desirable. To the extent Congress is merely searching for a model, however, there is some advantage in having available a uniform statutory approach. We believe it is better to set forth the basic principles in legislation such as H.R. 743, and to refer to that enactment when necessary in future legislation, than to have a proliferation of uncoordinated and inconsistent attempts to use reg-neg.

Funding Provisions and ACUS' Role

The bill authorizes the appropriation of $500,000 for each of 3 years to promote the use of negotiated rulemaking. It is my responsibility to inform you that the Administration opposes this authorization. We note that the authorization is inconsistent with the President's budget plan.

In the Conference's view, while some start-up costs may result in reluctance initially, agencies may enjoy substantial long-term savings from reduction in expected litigation and, perhaps, from reduced costs of agency compliance efforts. With regard to the Conference itself, I anticipate that in 1989 and 1990, it can rely on its current appropriation.

We believe that the bill's provisions calling for both consultative and reporting roles for the Administrative Conference are valuable. In addition to aiding particular reg-neg efforts, the Conference can continue to play a vital role in further development of both the theory and practice of reg-neg. Encouraging agencies to consult with the Conference as they undertake to convene reg-negs will help ensure that the procedure is being continually improved. We are charged under the bill with compiling and maintaining data related to negotiated rulemaking, and we believe that compiling empirical information will be vital to a better understanding of how and why the process does or does not work. We are likewise charged with a responsibility to report to the appropriate committees in Congress.

Conclusion

The Conference pioneered negotiated rulemaking in its 1982 study and recommendations. Three years later, following a careful examination of agency experience using reg-neg, the Conference concluded that the process had proven to be effective in developing proposals for agency rules in appropriate cases. It is now 1989 and the time is ripe to give negotiated rulemaking a needed legislative endorsement.

I will be pleased to answer any questions the subcommittee members may have.

OFFICE OF
THE CHAIRMAN

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

May 16, 1986

The Honorable Marshall J. Breger
Chairman, Administrative Conference
of the United States
2120 L Street, N.W., Suite 500
Washington, D.C. 20037

Dear Marshall:

Sometime ago, Loren Smith requested my views as to areas within the jurisdiction of the Commission for application of the techniques suggested in Recommendation 82-4 of the Administrative Conference. A memorandum is attached from the Commission's General Counsel, Daniel Goelzer. It concludes that literal compliance with the Recommendation would require legislation, but the SEC Commissioners and senior staff do frequently hold open roundtable discussions and other meetings at which we solicit the ideas of those affected by SEC regulations.

Please let me know if I can be of further help.

Sincerely,

John Shad

Attachment

MEMORANDUM

May 13, 1986

TO: Chairman Shad

FROM: Daniel L. Goelzer, General Counsel

RE: Recommendation 82-4 of the Administrative Conference

In his letter dated August 12, 1985, Loren Smith, then Chairman of the Administrative Conference of the United States, requested your views as to whether there are areas within the regulatory jurisdiction of the Commission for which there is any reasonable likelihood of successful application of the techniques suggested in Recommendation 82-4 of the Administrative Conference (the "Recommendation"). The Recommendation urges agencies in certain cases to consider negotiating with industry representatives in the drafting of proposed regulations. As discussed below, I believe it would be difficult to comply literally with the Recommendation without special legislation.

As you know, the Commission has supported the goals of the Recommendation, and has endeavored to meet with those affected by its regulations to ascertain their views on matters within the Commission's regulatory jurisdiction. For example, on September 5 and 11, 1985, and on February 19, 1986, the Commission held roundtables with representatives of the business, legal, and financial communities, on a variety of regulatory topics, including tender offers, the government securities markets, the liability and insurability of accountants and officers and directors, the internationalization of the securities markets, disclosure of merger negotiations, trading halts, and the origin and effect of rumors in the marketplace. More recently, the Commission held a roundtable on May 7, 1986 with representatives of financial planners, investment advisers, investment companies, broker-dealers, self-regulatory organizations, and state regulators to consider current regulatory problems in the investment advisory and financial planning businesses.

In addition, on September 12-14, 1985, the Commission sponsored its fourth annual SEC Government--Business Forum on Small Business Capital Formation. Approximately 150 small business executives, accountants, attorneys, financial analysts, broker-dealers, venture capital investors, financial advisers, bankers, and government officials met to discuss issue papers containing recommendations on taxes and securities.

With respect to the specific provisions of the Recommendation, our Office submitted comments to the Administrative Conference on a draft of the Recommendation by letter dated April 15, 1982.

The Recommendation as adopted differs in some respects from the draft. In particular, the Conference added a paragraph and other language urging Congress to amend the Federal Advisory Committee Act (FACA) to facilitate the use of negotiating techniques in rulemaking. This amendment is consistent with our previous comment that we believed waiver of application of the FACA and any ex parte restrictions is necessary to effective regulatory negotiation. The thrust of the Recommendation, however, is essentially the same as that of the draft.

I continue to believe that it would be difficult to conduct the kind of negotiations recommended by the Conference, in the absence of special legislation, including amendments to the FACA and the Administrative Procedure Act. For example, as recognized by Philip J. Harter in the report on which the Recommendation is based, negotiating committees should be able to close their meetings in appropriate circumstances, but current law generally requires open meetings. Also, as recognized in Paragraph 9 of the Recommendation, Congress should clarify the authority of agencies to fund the expenses of convenors and negotiating groups and to provide reimbursement for direct expenses of necessary negotiation participants if required. As noted in the articles enclosed with Chairman Smith's letter, the Federal Aviation Administration and the Environmental Protection Agency's recent regulatory negotiations were inhibited to some extent by these limitations. Indeed, the FAA apparently decided that it was required to comply with the FACA and established a formal advisory committee.

While it might be possible to attempt to develop rules by negotiation in areas within the regulatory jurisdiction of the Commission without special legislation, I believe the constraints imposed by the FACA and the other legal uncertainties in this area would make such an attempt impractical. I believe, however, that if appropriate legislation were enacted there are areas within the regulatory jurisdiction of the Commission where there is a reasonable likelihood of successful application of the techniques suggested in the Recommendation. In this regard, members of this Office have met with an American Bar Association subcommittee to explore amendments to the FACA which would assist the Commission in utilizing regulatory negotiation.

Department of Energy
Washington, DC 20585

September 27, 1985

Mr. Loren A. Smith
Chairman
Administrative Conference of the
United States
2120 L Street, N.W.
Suite 500
Washington, D.C. 20037

Dear Loren:

This is in response to your July 25, 1985, letter to Secretary Herrington, which requested consideration of areas within the Department's regulatory jurisdiction for which there is a reasonable likelihood of successful application of Recommendation 82-4, Procedures for Negotiating Proposed Regulations.

The Department has reviewed the proposed rulemakings currently scheduled for the next twelve months to determine whether any of them might be a suitable candidate for regulatory negotiations. None of these proposed rulemakings has proved to be suitable for such an undertaking. While there are a variety of reasons for the Department's determination with respect to particular proposed rulemakings, a reason common to all is the difficulties involved in complying with the Federal Advisory Committee Act (FACA). Recommendation 82-4 recognizes these difficulties and urges Congress to amend FACA to facilitate regulatory negotiations. Unless Congress reacts favorably to Recommendation 82-4 in this respect, FACA may well be one of the most significant hurdles to use of regulatory negotiations for a proposed rulemaking where they might be otherwise practical and beneficial.

I am appreciative of the intent underlying Recommendation 82-4 and of the work of the Administrative Conference generally to improve rulemaking. I regret that the Department cannot respond as affirmatively as it did recently when you requested consideration of Recommendation 82-5, Agency Procedures for Performing Regulatory Analysis of Rules.

Sincerely,

J. Michael Farrell
General Counsel

cc: James R. Richards

STATEMENT OF NEIL R. EISNER, ASSISTANT GENERAL COUNSEL FOR REGULATION AND ENFORCEMENT, DEPARTMENT OF TRANSPORTATION

[The prepared statement of Mr. Eisner follows:]

SUMMARY

Statement of Neil Eisner, Assistant General Counsel for Regulation and Enforcement, Department of Transportation

The Department of Transportation supports the negotiated rulemaking process. It conducted the first regulatory negotiation in the Federal government; the rulemaking involved a Federal Aviation Administration rule on flight and duty time limitations. The Department's Office of the Secretary is also currently engaged in another negotiated rulemaking to implement the Air Carrier Access Act of 1986, which prohibited discrimination on the basis of handicap in air travel. In addition, the Department's Federal Highway Administration and National Highway Traffic Safety Administration are considering using the process to implement Pub. L. 100-641, which requires the Department to issue regulations for a uniform system for parking for the handicapped.

Because of our positive experience with the process, we agree with the general purpose of the bill, which is to encourage others to use it. The Administration is continuing to review H.R. 743 and hopes to provide comments to the Committee in the near future. One general point the Department of Transportation would like to make is that any legislation should avoid a detailed framework that could overly formalize the negotiated rulemaking process by establishing norms.

Statement of Neil Eisner, Assistant General Counsel
for Regulation and Enforcement, Department of Transportation

Before The Subcommittee on Administrative Law
and Governmental Relations
Committee on The Judiciary
House of Representatives
Hearing on H.R. 743, "Negotiated Rulemaking
Act of 1989"

May 3, 1989

Mr. Chairman and members of the committee, my name is Neil Eisner. I am the Assistant General Counsel for Regulation and Enforcement at the Department of Transportation and it is a pleasure to have an opportunity to be here today to testify on H.R. 743, the "Negotiated Rulemaking Act of 1989."

The Department of Transportation supports the negotiated rulemaking process. I am the Department's representative on the Administrative Conference of the United States, and we participated actively in the development of the Conference's two sets of recommendations on regulatory negotiation. We have also been actively involved in a number of ongoing efforts by the Conference to encourage the use of the regulatory negotiation.

The Department of Transportation conducted the first regulatory negotiation in the Federal government; the rulemaking involved a Federal Aviation Administration rule on flight and duty time limitations for air carrier crew members. At the present time, the Department's Office of the Secretary is engaged in another

negotiated rulemaking to implement the Air Carrier Access Act of 1986, which prohibits discrimination on the basis of handicap in air travel. Finally, the Department's Federal Highway Administration and National Highway Traffic Safety Administration are considering establishing a Federal advisory committee to negotiate a rule to implement Pub. L. 100-641, which requires the Department to issue regulations for a uniform system for parking for the handicapped. The legislative history of the statute includes a request to use regulatory negotiation for the rulemaking.

Our experience thus far with regulatory negotiation has been positive. We believe that if the negotiations are properly set up -- if, for example, all of the appropriate parties are invited to participate -- the process can be helpful even if it does not result in the ultimate objective of full consensus on all issues. The opportunity to discuss, in a relatively non-adversarial setting, issues and problems -- rather than attack proposed solutions -- offers a positive approach. Parties with a significant interest have an opportunity to play an important role in shaping the regulatory solution. The ability to ask many questions and to exchange information easily enables everyone to better understand the issues involved. The assistance of an experienced mediator or facilitator helps in the narrowing of differences. The process can provide the agency with more information than it would normally obtain through the notice and comment process of the Administrative Procedure Act. With this

information it should be able to have a more successful rulemaking. Since the interested parties have been offered an opportunity to play such an important role in the development of the rule, they will have a better understanding of how difficult the agency's job is and should find the rule more acceptable than they otherwise might find it. Having a better understanding through this process of the problems that others would have with different solutions should make the rule more acceptable to all of the parties and should make them less likely to challenge it.

This does not mean that regulatory negotiation is the ultimate solution for all rulemaking issues. There are rulemakings where this added step would be unnecessary, where there would be insufficient trade-offs available to foster meaningful negotiation, or where the issues would be considered by the parties to be non-negotiable.

The Department also recognizes that the process can add costs and time to the rulemaking process. For example, the need to hire a mediator can add costs that would not otherwise be incurred. Seeking public comment on the agency proposal to establish an advisory committee to negotiate a proposed rule, plus the time taken by the negotiations themselves, can add time to the normal rulemaking process.

An excellent illustration of this is the Department of Transportation's initial effort in this area, the FAA's flight and

duty time regulations. For many years the FAA had thought it necessary to update these regulations. The FAA found that the old rules had been overtaken by major changes in airline industry equipment and operating practices. The agency found some of the old rules very difficult to enforce, and the rules were so complex that the FAA had to issue over 1,000 pages of interpretations. In 1977 and 1978, the FAA issued related notices of proposed rulemaking on the subject. Based upon the comments received from the airline industry, the FAA decided that it was necessary to issue a supplemental notice in 1980. The nature of the objections raised by the commenters required the FAA to withdraw that NPRM. As the FAA explained it, "virtually all affected segments of the air transportation community opposed one or more aspects of the proposals." As a result, in 1983, the FAA decided it was time to try a new approach and initiated a regulatory negotiation. That process resulted in the issuance of a final rule in 1985. Although full consensus was not achieved on all issues, the participants generally seemed quite pleased with the process and the agency achieved an objective that it had been unable to achieve prior to regulatory negotiation: it issued a final rule. That rule still stands today.

In our second regulatory negotiation, the one involving the implementation of the Air Carrier Access Act of 1986, many of the parties requested that the Department use the regulatory negotiation process. The Department had some initial reservations about conducting a regulatory negotiation because the matter

involved issues that we thought might be so crucial to some of the participants that they would be unable to compromise. After the Department briefed the potential participants on the concept of regulatory negotiation and what it involved, they advised us that they understood our reservations but thought the process would be valuable. After asking for public comment, we decided to establish an advisory committee to conduct the regulatory negotiations. The negotiations started in June 1987 and proceeded through November 1987. Near the end of the scheduled time for the development of the proposed rule, the participants representing the interests of the handicapped left the negotiations over an impasse on the issue of whether there should be any restrictions on who can sit in aircraft exit row seats.

Despite this, the Department believes that the process was valuable. So did the principal disability group participants, who subsequently sought the use of regulatory negotiation in the rulemaking on parking for the handicapped. Progress was achieved on many issues prior to the premature termination of the negotiations and the Department has a much better understanding of the problems and potential solutions at issue in that proceeding. Based on the information that we gathered, the Department issued a notice of proposed rulemaking on June 22, 1988. At the request of representatives of the handicapped, we extended the comment period until December 19, 1988, and, at the request of representatives of the aviation industry, we provided a response period, which closed on January 18, 1989. At the present time, the Department is

completing its review of the public comments and exploring with the mediator what the next appropriate steps would be.

The Department welcomes Congressional consideration of the value of the negotiated rulemaking process and agrees with the general purpose of H.R. 743, which is "to encourage agencies to use the process when it enhances the informal rulemaking process." We do not believe that the bill provides us with any additional authority but, rather, simply codifies the existing practice of those agencies that are using the process. The Administration is continuing to review the bill and hopes to provide comments to the Committee in the near future. One general point that I would like to make is that any legislation should avoid a detailed framework that could overly formalize the negotiated rulemaking process by establishing norms. Although section 581 in H.R. 743 stresses that it is establishing a framework and should not "be construed as an attempt to limit innovation and experimentation," an agency might be discouraged from using the process for fear it might have to explain any deviations.

Because we believe there are benefits in the regulatory negotiation process, we support the general purpose of the proposed legislation. We believe that such legislation could encourage the use of this alternative form of dispute resolution.

I appreciate the opportunity to testify here today and would be glad to answer any of your questions at this time.

STATEMENT OF ROBERT P. BAKER, ACTING DIRECTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE, ACCOMPANIED BY EILEEN B. HOFFMAN, DISTRICT DIRECTOR

[The prepared statement of Mr. Baker follows:]

Testimony of Robert P. Baker, Acting Director
Federal Mediation and Conciliation Service
May 3, 1989

I am Robert P. Baker, Director of the Eastern Region of the Federal Mediation and Conciliation Service, and presently the Acting Director of the Agency. I want to thank the Committee for asking me to come here today and comment on H.R. 743, the "Negotiated Rulemaking Act of 1989." With me this morning is Eileen B. Hoffman, the FMCS District Director for the Washington, D.C. area.

I think it is commendable, Mr. Chairman, that Congress, through this Bill, is seeking to encourage the use of negotiation in the rulemaking process.

Our experience indicates that in some cases there is a better way for developing rules. And that better way is to introduce the added step of negotiation.

It is worthwhile emphasizing that negotiated rulemaking is an added step rather than a wholesale reworking of administrative procedures. Prior to writing a notice of proposed rulemaking, representatives of the agency and representatives of the interests involved sit down together, and try to work out a consensus on what the proposed rule should say. The agency, of course, must operate within the scope of its statutory program. And the representatives of the affected interests must be willing to come together, and join with the agency in the attempt to find a consensus. This is the only step that is different, and the only step that is added to our present rulemaking process.

This step, however, can be beneficial because it brings life to the rulemaking process. It means that people deal with people. It means that the realities come into focus.

And it means that people deal with each other in a way that is unique. It means homogenization. All the parties come in contact with, and deal with, each other. All the parties interchange and relate to each other.

The result of this coming together is that a scope of knowledge and understanding is produced, which we believe is helpful. Even, at the end, if consensus is not complete, what is learned and shared by the agency and the parties through this multi-faceted examination can be valuable.

If there is a consensus, then it is likely that the proposed rule, and final rule, will reflect a sensitivity to all issues involved, and an all-around fairness in arriving at the goals that Congress intended to reach.

It must also be said, that there are perils on the path of negotiated rulemaking. Agencies must be careful about the issues they choose for regulatory negotiation. You must measure this plank twice before you saw it.

If there is some party or some group, that sees an issue as an absolute - as something for which there can be no compromise - then forget about regulatory negotiation. And the point should be made, that these persons may be within the agency, as well as outside it.

This means, of course, that the agency must be fully committed to the regulatory negotiation process. But commitment alone is not enough. Most agencies - and most parties - need some level of training before undertaking a regulatory negotiation or "reg-neg". Most are dealing with this process for the first time, and FMCS has found that a brief joint training program - tailored to the needs of the particular agency and parties involved - is a highly desirable way of launching a reg-neg. The parties learn what the negotiation process is all about - how they will function and how the neutral mediator will function - and they also begin the process of getting to know each other and of working with each other.

Every reg-neg is also subject to the perils of getting off the track, and getting bogged down.

It is in such situations that a skilled mediator is important because it requires both sensitivity and strength to keep a group of approximately twenty persons on the straight and narrow path. The agency cannot take the role of guide down this path, as it must sit at the table representing its needs and its interests. Rather, the responsibility rests on the shoulders of the mediator. Likewise, it is the mediator who must decide if sub-groups or working groups need to be established to work on some problems and then report back to the plenary group and seek that group's approval of what they have done.

While there are some further perils, as I have called them, I will mention only one more which I think must be pointed out. And that is the failure to communicate. The representatives of the parties must report back to home base, back to their headquarters, on what is going on at the table. Headquarters needs to be constantly aware of what is taking place, so that the representative will know what kind of consensus is realistic, and what kind is not. This, naturally, applies to the agency as well as the parties. The failure to communicate endangers the entire reg-neg process.

The FMCS has lived through a substantial number of these perils, and not without an occasional scar to show for it. We have now provided our services as mediator in six regulatory negotiations. The first was for the Federal Aviation Administration (FAA). The FAA had issued proposals for revising the regulations governing hours of flight time and rest time for commercial pilots. The FAA proposals met with so much resistance, that FAA decided it would try negotiated rulemaking. This effort ended with a new final rule which was issued in 1985. We supplied the mediator for this reg-neg.

Next was the Occupational Health and Safety Administration of the Department of Labor (OSHA). OSHA used reg-neg to develop a proposed rule governing worker exposure to MDA, a chemical with properties that can cause cancer. The results of the reg-neg were used by OSHA to prepare a notice of proposed rulemaking, and this proposal is now at the Office of Management and Budget for review. Again, we supplied the mediator.

In 1987 we supplied three of the five mediators used in a major reg-neg conducted for the Environmental Protection Agency (EPA). This reg-neg was to develop a proposed rule for removal of asbestos from public and private schools under the Asbestos Hazard Emergency Response Act (P.L. 99-519). Based on the results of this regulatory negotiation, EPA published a proposed rule and a final rule. The final rule was challenged in court, but the U.S. Court of Appeals for the D.C. Circuit upheld it as being fair and reasonable (846 F. 2nd 79, 1988).

Another reg-neg, in which we participated, was for the Department of Transportation (DOT). DOT was required by the Air Carrier Access Act (P.L. 99-435) to issue regulations prohibiting discrimination in airline travel on the basis of handicap. While full consensus was not reached, about 70% of the DOT proposed rule was developed through negotiated rulemaking. The comments on the proposed rule are in, and are now under consideration. Again, we supplied the mediators for this reg-neg.

We also assisted the Department of Education (ED) in conducting a reg-neg. This Department of Education reg-neg was mandated by a specific provision in the Elementary and Secondary Education Act which required the use of regulatory negotiation. The issues concerned implementation of statutory changes to the Department of Education's multi-billion dollar program for education of disadvantaged children. The two mediators for this reg-neg were supplied by

FMCS. Although a partial consensus was achieved at the reg-neg, an independent study completed in March, 1989 has concluded that the consensus did not hold once the NPRM was published.

Our most recent participation in a regulatory negotiation was for the Department of Agriculture (DOA). This reg-neg concerned measures to be taken to halt the spread of the Varroa Mite - a tiny creature which is a parasite on honeybees and disrupts the production of honey. The spread of the Varroa Mite was causing a serious impact and was a potential threat to spread across the country. A full consensus was reached, and two of the three mediators were furnished by FMCS. The agency, however, has decided not to go forward with the rule because of adverse comments received.

Shortly before coming to this hearing, we received a request from the National Highway Traffic Safety Administration of the Department of Transportation for reg-neg assistance, and we will be holding an exploratory meeting with them later this month.

Our history as an agency of professional mediators has caused Federal agencies to look to us for this kind of assistance. This history includes a significant experience and understanding of negotiations, and the dynamics of the bargaining table. But it also includes additional expertise as well.

First, FMCS has an excellent training capability. We can put together an in-depth program and we can staff it with outstanding trainers. And we have done this for a number of Federal agencies, who have asked for mediation and negotiation training.

Second, we have many years of experience in operating a roster of neutral arbitrators. These persons are not Federal employees, but rather are college professors, engineers, or professional arbitrators, who are obtained through us, but who are paid for their services by the parties. Our roster has some 1,700 qualified persons on it, and we process about 30,000 requests a year for lists of arbitrators furnished from our roster.

I do not see the role of FMCS as mediating every creature in the forest of regulatory negotiation. I believe, however, that FMCS is especially suited to operating in at least two areas:

One is mediating major cases; that is, cases involving numerous complex issues and requiring intensive mediation support.

Another is in providing training services, to educate others to successfully conduct regulatory negotiations, whether as parties or as mediators.

In bringing these remarks to a close, Mr. Chairman, I want to give deserved credit to those who have worked diligently to further this concept. The Administrative Conference of the United States has been the pioneer in the effort to make reg-neg better known, and to have reg-neg used where it is needed. Their hard work has been a key factor in the growth and development of regulatory negotiation within the Federal Government.

Mr. Chairman, Ms. Hoffman and I will now be glad to try to answer any questions you, or other members of the Committee, may have.

[Recording resumes at 10:36 a.m.]

Mr. FRANK. One of the things I want to ask you about, and I'm glad we have been joined by Mr. Douglas; I think a practice has grown up—this is not a partisan issue. This is an issue which is an executive and legislative one.

In the absence of regulation, what's the effect of that statute? This is not directly relevant to this hearing, but we're going to revisit this. We passed the statute in 1986 giving access to the handicapped. Because it was complicated, we haven't gotten regs yet. What rights do the handicapped people now have?

I mean, is the statute in effect or is it suspended, de facto, because we don't have regs?

Mr. EISNER. Part of what led to this particular statute was that there were existing regulations that the Supreme Court held could not apply to nonsubsidized airlines. That resulted in the Air Carrier Access Act, saying all air carriers would provide access. At the present time, there can be some dispute over application of the statute because there are just some general provisions.

Mr. FRANK. This is a general question: We pass a law, and it's not immediately implemented by regulations. We understand that there can be some time period. I have had executive branch people tell me—not from you; it happened to come from HUD—that we had passed the law and it had been signed and it had gone into effect according to its terms. It wasn't really in effect because they hadn't promulgated regulations.

Now, that seems to me to be patently wrong. When Congress passes a law, that law is in effect, and the beneficiaries have the benefit of it. You may, by regulations when they are promulgated, affect how that happens. Absent some suspensory clause in the act, I don't see how the act isn't in effect, pending regulations.

Mr. EISNER. Part of the problem is answering the specific questions of what an airline has to do; whether it has to provide certain services——

Mr. FRANK. But it would have to do something?

Mr. EISNER. Yes.

Mr. FRANK. In the absence of regulations then, I presume people could sue and they could go to court.

Mr. EISNER. They could sue under the statute. In fact, there has already been a successful lawsuit against an airline under this act. Let me mention though, in terms of time here, the Department was considering issuing some very general regulations on a temporary basis, pending completion of the negotiated rulemaking, so that the statute would be implemented very quickly. The people who would benefit from those regulations, the groups representing the handicapped, told us that they would prefer that we do nothing; that we wait, because they thought that was a bad precedent to start off the negotiated rulemaking like that.

Mr. FRANK. I appreciate that. One of the things we want to make clear for this hearing is that regulatory negotiations were no part of the delay. The fact that you would do—let me ask you; if you had not been doing the regulatory negotiations, but had been doing your regulations in the other, more traditional form, would it have been quicker?

Mr. EISNER. I doubt that we would have been able to get to a final rule successfully. We may still have problems getting to a final rule. We have been involved, for example, in the area of transportation for the handicapped for years—access to mass transportation, for example—going back and forth and the courts overturning rules.

The FAA experience with the flight and duty time limitations rulemaking is illustrative; the FAA did it by the APA process and twice had to withdraw the NPRM. They added time to the beginning with regulatory negotiation, but it got a final rule issued.

Mr. FRANK. They also suggest in some of the areas which we know to be particularly contentious—we might not want to spend a lot of time trying to reach a consensus which is impossible to reach. There may be some areas which are sharply drawn that that will happen.

Let me just say, you've answered my questions. I just want to say that we probably will be asking you back, because this will be an example—or somebody from your Department. I intend to have some hearings later on on this issue. What happens when a statute is passed? What is the effect of that statute on the rights of the individuals who are supposed to be affected by it until we get regulations.

I think that's frankly sort of grown up on us without a lot of attention. Maybe in a few months we're going to take a look at that. Maybe we need to have some generic process. I know there are some people in the executive branch who think that the failure to promulgate regulations, in effect, suspends the statute, and that's simply not constitutionally possible. I think that's where a lot of people were. We'll get back to it.

I thank you. Mr. Staggers.

Mr. STAGGERS. Thank you, Mr. Chairman. Mr. Eisner, I guess my questions would be focused toward you. On the bill by Mr. Pease, there is no judicial review—it specifically excludes judicial review for procedural matters. That causes me some problems. Would you like to comment on that, or maybe you don't have any comment on that?

Mr. EISNER. My personal feeling is that that is appropriate; not to have judicial review on the procedural issues in the negotiations, but clearly we should have judicial review on the substance of the rulemaking.

Mr. STAGGERS. Mr. Baker, I notice you shaking your head yes. Do you have an opinion?

Mr. BAKER. Yes, I agree.

Mr. STAGGERS. Can you explain why?

Mr. BAKER. Yes, sir, the ability of the agency formulating the rule to come together in an open negotiating forum with parties of interest, under the auspices of a neutral mediator; it's a process that really is not appropriate to litigate. If, in the final analysis, errors are made, gross errors and perhaps convening the appropriate people, the rule itself can be challenged. There is the recourse which is no less than it would have been had the agency promulgated the rule without having convened the parties of interest.

Mr. STAGGERS. Thanks for that explanation. Mr. Pease, in his testimony, mentioned that the legislature will not force the agencies

to do anything they do not want to do. Some of the opponents of the bill have said that actually what this will do is the agencies will abrogate their responsibilities of rulemaking to interest groups. Could I get your comment on that, Mr. Eisner; that actual interest groups would be writing the rule and the agency would give up?

Mr. EISNER. I don't think that will happen. I think it is very important to make it clear to agencies that they are to play a role. For example, it would be inappropriate for two different groups interested in a rulemaking to compromise on a safety issue because the employer is willing to pay a higher salary to the employee. The agency has to be there and the agency has to play a role.

If anything, the problem is the other way. We have to make clear to all of the public participants that we cannot give them the final authority. Even though everybody around the table agrees and signs off on the dotted line, the Administrator still must look at the document. The Administrator must make a decision that it is within his or her authority and responsibility.

Mr. STAGGERS. So the agency would be the final rulemaker.

Mr. EISNER. The agency has to be the final decisionmaker. You cannot delegate that.

Mr. STAGGERS. No further questions.

Mr. FRANK. Mr. Douglas.

Mr. DOUGLAS. No particular statement or questions, other than I am curious. How do you make sure that you've got all the right people in the room; that you don't go through the process and maybe have left out somebody who surfaces in a lawsuit a year later and everyone says, gee, we never thought of them?

I know there's no foolproof way to do that, but I'm just curious. For some agencies it's easy. You've got clear adversaries. In other agencies and other rulemakings, it might be a little more ephemeral as to who is really supposed to be at your table.

Mr. EISNER. We do two major things. One, we put out a notice in the Federal Register. We don't assume that everybody reads the Federal Register, so the second step is: We try to make sure that we get media coverage—the trade journals, the general press that might be interested in the area. We make sure that everybody knows we are doing this.

We specifically ask for comment on not only whether we have chosen the right parties, but in some areas we acknowledge that we don't know who can represent a particular interest that we've identified. We ask for a little help in that area, and try to be very accommodating. For example, our goal in our first rulemaking was to have around 15—we preferred not to exceed 15 people at the negotiating table—and when all the comments came in, we realized that we could accommodate everybody who felt they should be a party to the proceedings by going up to 18.

We figured we eliminate one issue by putting these other three people on and having 18 people. We have not had any real serious issues raised with us about whether we have the right people at the table, or whether we should have had somebody else. Another important thing that we do is, during the meetings of the advisory committee, we try to provide at least one or two occasions when

We set aside 1 day or 2 days and let them come in and essentially hold a public hearing, so that anybody who feels they should be there still has a chance to speak.

Mr. DOUGLAS. I didn't check the publication of notice provision of the bill, but does it indicate you would make—you generically as an agency—would use trade journals or other specialized publications. Do you know if 743 goes into that?

Mr. EISNER. I don't believe that 743 goes into that.

Mr. DOUGLAS. Should it at least say that? In other words, what you do sounds great. If we're going to be setting out guidelines so that the APA process has a little bit of meat on the bones, should we so indicate in our statute?

Mr. EISNER. What I would suggest, Mr. Douglas, is that it probably should say something like: "give appropriate notice," and the legislative history should give examples of things like "notify trade journals." There are going to be so many different variations at so many different agencies that we should allow them some discretion as to what is appropriate.

Mr. STAGGERS. Would the gentleman yield?

Mr. FRANK. Mr. Staggers first.

Mr. STAGGERS. One of the questions I had was with judicial review in the agency relating to establishing this committee. That was the answer to part of Mr. Douglas' question. If you weren't a party, and you wanted to be a party, then you could have access at the beginning of the process as opposed to the end of the process?

Mr. EISNER. I'm not sure I follow the question, Mr. Staggers.

Mr. STAGGERS. Maybe you don't have a copy. I see some staff indicating that they can answer this question, so I'll talk to the staff.

Ms. HOFFMAN. I wanted to just mention that you've hit a key area in the reg/neg area. The convening stage is critical, and some of the agencies have a neutral convener. Some of them do it themselves. It's very important to have all the interests at the table. It may not be all the groups. In other words, what's happened in many of these reg/negs is that you get groups that cluster, public interest groups agree to have one representative with appropriate communication back to the others.

I would just say that the convening stage is critical. Occasionally, if an interested party feels that it is not at the table, there have been petitions to the reg/neg committee, and they have been included. That happened with the asbestos reg/neg. In the middle of the asbestos reg/neg, the State's attorney general, who had been invited but had, for whatever reason, declined; then asked to be represented. The reg/neg committee, which is constituted by consensus, agreed to include them. There is that possibility, but the idea of the convening stage is to make sure that you've got as much advance notice to the parties so that all the interested groups are available, and of course, many times the agency has to respond as to why a particular group is not included.

Mr. FRANK. Thank you. We will next hear from our final panel. Mr. Nordhaus and Mr. Hitchcock. Mr. Nordhaus, you are first on the list. Let's begin with you.

STATEMENT OF ROBERT NORDHAUS, VAN NESS, FELDMAN, SUTCLIFFE & CURTIS

Mr. NORDHAUS. Mr. Chairman, I am Robert R. Nordhaus. I'm a lawyer in private practice in Washington, and prior to that, I was general counsel of an agency and did quite a bit of rulemaking.

Mr. FRANK. With what agency?

Mr. NORDHAUS. The Federal Energy Regulatory Commission. I have had some experience with trying to use advisory committees to assist the agency in drafting rules. I'd like to just give a couple reactions to the bill, Mr. Chairman.

The first is that I think that the concept of regulatory negotiation has a lot of promise. It's one that Congress and executive agencies should follow up on. I guess my reaction to the bill, though, is that there's a good deal more specification of exactly how to do it than perhaps is called for at this stage. I think agencies need to be given more flexibility rather than less.

I have a couple specific suggestions as to areas where more flexibility is needed. First, I think, as Mr. Eisner indicated, there are occasions when it's quite feasible to proceed with negotiation without setting up a committee at all, because there are few enough interested persons, or alternatively, there are natural groupings where the interest groups pick their own representatives to work in a rule. I think the bill should recognize this possibility.

Second, I think that on the timing on when the agency gets input from the advisory committee or the negotiation, I think agency experience recognizes that there is a place for negotiation after the NOPR is issued. I think the bill should specifically contemplate that.

The advisory committee procedure contemplated by the bill, I think, has a number of problems, the first of which is the area that has been recognized as the one area that, in this whole regulatory negotiation scheme, requires legislation. That is the applicability of the Federal Advisory Committee Act. I think both agency letters attached to ACUS' testimony recognize that as the principal reason why legislation is needed because there are requirements of the Federal Advisory Committee Act which make it difficult for productive negotiations through an advisory committee.

My suggestion would be that provision be made in the bill to permit the facilitator, that is the person who chairs the negotiation, to close the meeting, if necessary to get participants to disclose what their real position is and, in addition, to permit the facilitator to have private meetings with participants to find out, in effect, what their bottom line is. I think that's essential to any kind of effective negotiation.

The second area I would suggest more work would be helpful is making sure that agencies have a directive to impose deadlines on the advisory committee. I think there is concern that advisory committees can become an excuse simply to delay rulemaking forever.

There are several other things I mention in my testimony. Let me mention one that I think is particularly important, just from the point of view of clarification.

That is the applicability of Federal conflict of interest statutes to members of an advisory committee who receive reimbursement for

travel expenses or a per diem. It seems to me it ought to be clear exactly what their status is. It seems to me that you may want to apply some conflicts rules to the conveners and facilitators. But for members of the committee who are representing outside interest groups, it's inappropriate to subject them to any Federal conflicts laws.

Mr. FRANK. Fortuitously, this subcommittee has jurisdiction over that, as well. So that is one of the things that, without turf problems, we could resolve.

Mr. NORDHAUS. The final thing I would mention is I think, if possible, the committee ought to recommend little more than half million a year for ACUS to carry out the program.

[The prepared statement of Mr. Nordhaus follows:]

Summary of
Testimony of Robert R. Nordhaus
on H.R. 743

May 3, 1989

H.R. 743's premise is that negotiated rulemaking will produce better rules, fewer legal challenges, and more expeditious rulemaking proceedings. Some of the bill's provisions may, however, discourage the use of negotiated rulemaking, limit its effectiveness, and chill experimentation. The following modifications would increase the likelihood that the bill will achieve its intended purpose:

(1) The bill contemplates that regulatory negotiations will be conducted only through advisory committees, consisting of persons designated by the agency to represent various interest groups. Funding under the bill is available only if agencies use such committees. The bill should explicitly permit agencies to dispense with advisory committees and conduct regulatory negotiations in which all interested persons may participate.

(2) The Federal Advisory Committee Act (FACA) applies to any regulatory negotiation conducted through an advisory committee. FACA was not designed to facilitate negotiation and is ill-suited for that purpose. The Administrative Conference of the United States (ACUS) should be directed to recommend procedural rules for regulatory negotiation committees that would apply in lieu of FACA's rules.

(3) The bill contemplates an extended regulatory negotiation process before the agency issues its notice of proposed rulemaking (NOPR). This time-consuming extra step (which can take several years) can be avoided if the regulatory negotiation occurs after the NOPR is issued. Agencies should be encouraged to use negotiated rulemaking at this stage also. Any negotiation after issuance of the NOPR should be public.

(4) Agencies should be given authority (and direction) to ensure that the regulatory negotiation process does not become a tool for delaying rulemaking proceedings.

(5) Participants in a regulatory negotiation may follow a two-track strategy of bargaining in the negotiations to obtain a favorable rule and then attacking the rule on judicial review if the agency adopts it. Agencies should take steps to preclude participants in a regulatory negotiation (and their non-participating allies) from using such a strategy.

TESTIMONY OF ROBERT R. NORDHAUS

BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE LAW

AND GOVERNMENT RELATIONS

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON H.R. 743

"THE NEGOTIATED RULEMAKING ACT OF 1989"

MAY 3, 1989

Mr. Chairman and Members of the Subcommittee, my name is Robert R. Nordhaus. I am a partner in the Washington, D.C. law firm of Van Ness, Feldman, Sutcliffe & Curtis, and former General Counsel of the Federal Energy Regulatory Commission. I appreciate the opportunity to submit my views on H.R. 743, the Negotiated Rulemaking Act of 1989.

I. Summary

H.R. 743's premise is that negotiated rulemaking will produce better rules, fewer legal challenges, and more expeditious rulemaking proceedings. Some of the bill's provisions may, however, discourage the use of negotiated rulemaking, limit its effectiveness, and chill experimentation. The following modifications would increase the likelihood that the bill will achieve its intended purpose:

(1) The bill contemplates that regulatory negotiations will be conducted only through advisory committees, consisting of persons designated by the agency to represent various interest groups. Funding under the bill is available only if agencies use such committees. The bill should explicitly permit agencies to dispense with advisory committees and conduct regulatory negotiations in which all interested persons may participate.

(2) The Federal Advisory Committee Act (FACA) applies to any regulatory negotiation conducted through an advisory committee. FACA was not designed to facilitate negotiation and is ill-suited for that purpose. The Administrative Conference of the United States (ACUS) should be directed to recommend procedural rules for regulatory negotiation committees that would apply in lieu of FACA's rules.

(3) The bill contemplates an extended regulatory negotiation process before the agency issues its notice of

proposed rulemaking (NOPR). This time-consuming extra step (which can take several years) can be avoided if the regulatory negotiation occurs after the NOPR is issued. Agencies should be encouraged to use negotiated rulemaking at this stage also. Any negotiation after issuance of the NOPR should be public.

(4) Agencies should be given authority (and direction) to ensure that the regulatory negotiation process does not become a tool for delaying rulemaking proceedings.

(5) Participants in a regulatory negotiation may follow a two-track strategy of bargaining in the negotiations to obtain a favorable rule and then attacking the rule on judicial review if the agency adopts it. Agencies should take steps to preclude participants in a regulatory negotiation (and their non-participating allies) from using such a strategy.

II. The Need For Negotiated Rulemaking

As this bill recognizes, public participation in the typical rulemaking process is often not as productive as it could be. Parties tend to stake out positions and defend them to an extreme, refusing to admit that their concerns on some issues are really not all that critical. Industry participants rarely propose adequate alternatives to agency proposals, and public interest groups make little effort to understand the potential burdens of their own proposals. The agency staff struggles alone to find creative solutions to pressing problems, often distracted rather than aided by a cacophony of criticism from all sides.

The potential benefits of negotiated rulemaking are many. Foremost is the education provided to the regulatory agency and the participants during the negotiation process. The exchange of information and concerns among parties with very different perspectives invariably improves everyone's understanding of the legal, factual, and policy issues at stake. With the focus on problem solving, rather than "winning," the participants can help the agency identify the truly important issues and explore alternative solutions. Whether or not the negotiations lead to consensus, they are likely to result in a better regulation -- that is, one resulting from a more fully informed understanding of the competing interests that will be affected by the regulation.

Ideally, the participants do reach a consensus as to what form of regulation will best meet the statutory obligations of the agency while minimizing the burdens of compliance. However, even if consensus is not achieved, dissenting participants may be less inclined to challenge the final outcome, because they are satisfied that the process was fair and their concerns were fully considered.

Thus, parties are less likely to seek judicial review of negotiated regulations, and those regulations are more likely to be upheld when review is sought. This alone can shorten substantially the period between initial identification of a problem and the date the rule becomes final. It is possible, also, that the negotiation process, if it occurs before issuance of the NOPR, can shorten the time between publication of the proposed rule and promulgation of the final rule, because the proposal at the NOPR stage is better focused than one developed by the agency staff alone.

III. H.R. 743

A. Overview of H.R. 743

H.R. 743 is an effort to encourage agencies to use negotiated rulemaking. The bill provides a framework for the operation of negotiated rulemaking committees, generally requiring such committees to operate, as they have in the past, within the constraints of FACA. The bill provides guidelines for agency determinations as to whether the negotiation process is likely to be fruitful in a particular context, and it authorizes agencies to employ "convenors" to help them make that determination. It imposes detailed procedural requirements for the creation of a rulemaking committee, but precludes judicial review of an agency's compliance with these requirements.

The bill authorizes agencies to employ "facilitators", who may chair committee meetings. The bill also allows agencies to compensate rulemaking committee members for their expenses of participation, if they otherwise lack adequate financial resources and will represent an interest that would otherwise lack adequate representation. H.R. 743 directs ACUS to maintain a roster of persons interested in serving as convenors or facilitators and to provide other assistance to agencies seeking to conduct negotiated rulemakings.

Up to $500,000 is authorized annually for the next three years for ACUS to assist agencies financially with negotiated rulemakings. These moneys may be used, among other things, to help agencies hire experienced convenors and facilitators, reimburse essential committee members for their expenses, and train committee participants.

B. Substantive Concerns

I fully support the bill's goal of encouraging wider use of negotiated rulemaking. I am concerned, however, that some provisions may not in fact further that goal and may indeed discourage the use of this procedure and chill experimentation with this new concept. Changes to the bill are needed to

increase the likelihood that negotiated rulemaking will deliver the benefits the bill intends to achieve -- namely, better rules, fewer legal challenges, and more expeditious rulemaking proceedings.

1. Reliance on Advisory Committee Mechanism

The only method of negotiated rulemaking the bill provides for is through the mechanism of advisory committees established and operated in accordance with FACA. While the bill does not preclude negotiated rulemakings that do not use advisory committees, financial assistance under § 589(f) is available only to agencies that adopt the rulemaking committee approach.

Agencies should be encouraged to try other approaches. There is certainly no reason that negotiation can proceed only through a committee of representatives selected by the agency. Many rulemakings involve few enough participants that all can participate in the negotiation. In other circumstances, participants with a common interest can participate in a negotiation through a common representative they have chosen themselves. In fact, experience with the Federal Energy Regulatory Commission's (FERC) settlement procedures indicates that negotiations with 50 to 100 participating parties frequently reach consensus, or near consensus, if the negotiation is properly structured.1/

Accordingly, in many circumstances, negotiation procedures that do not entail use of an advisory committee may be equally effective in developing a consensus among potentially affected interests. Dispensing with the advisory committee mechanism avoids problems of administering an advisory committee and questions as to whether it is representative. The bill should explicitly permit agencies to dispense with advisory committees.

2. Applicability of FACA

H.R. 743 contemplates negotiated rulemaking through advisory committees, selected by the agency, which are to be representative of interests affected by the rule. It also

---

1/ FERC's procedures, codified at 18 C.F.R. § 602, are used in on-the-record natural gas and electric utility ratemaking and licensing proceedings. In the recent Northeast U.S. Pipeline Projects proceedings at FERC, the Commission-appointed settlement judge certified settlements of 37 natural gas pipeline applications involving 13 discrete construction projects. The judge stated that over 250 people participated in the settlement negotiations which were concluded in less than 4 months.

requires agencies attempting to use such committees to comply with all of the detailed requirements of FACA. My experience indicates that advisory committees operating under FACA are unwieldly vehicles for negotiation. FACA was designed to regularize the procedure by which agencies receive advice from groups organized by the agency. It was not designed for -- and in fact is badly suited to -- facilitating negotiation among private parties or between private parties and the agency. To successfully conclude a negotiation involves, and often requires, frequent meetings, private discussions, long hours, and irregular meeting times.2/ Several provisions of FACA make negotiation more rather than less difficult.

Under FACA, all advisory committee meetings must be open to the public, unless a Sunshine Act exemption is available (and usually one isn't). Effective negotiation requires private meetings on some occassions, particularly when participants are unwilling to reveal a negotiating position in public. The bill should permit the facilitator to close meetings, or to meet privately with individual participants.

The requirements under the General Services Administration rules implementing FACA that a Federal Register notice be published 15 days in advance of a meeting effectively precludes closely spaced negotiating sessions unless the agency has the foresight to notice several days of meetings at once. (In fact, the 15 day notice requirement is closer to a 20 day requirement because of the lag in getting notices published in the Federal Register.) The notice requirement is of particular concern because it renders the agency unable to continue negotiations from day to day if they appear to be fruitful. Because a follow-up meeting must be renoticed under FACA, the agency must adjourn for several weeks before resuming negotiation. The agency should be given flexibility to maintain the continuity of negotiations.

In sum, if negotiation is to be through advisory committees, procedural requirements different from FACA's should apply. My suggestion here would be to direct ACUS to recommend special purpose procedural rules for advisory committees engaged in regulatory negotiation. Agencies would be permitted to use these rules instead of FACA's. ACUS would be directed to retain FACA requirements to the extent consistent with providing an environment conducive to successful negotiation; however, departures from FACA's provisions would be permissible where

---

2/ The Northeast Pipeline settlement negotiations required 96 meetings involving some or all of the parties over a 110 day period.

necessary to facilitate negotiations.3/

3. Timing of Advisory Committee Input

Use of advisory committees to recommend a proposed rule to the agency adds an additional step to the already drawn out rulemaking process. The negotiation process in a negotiated rulemaking typically takes several years. Use of negotiation during the public comment period on the NOPR may capture many of the benefits of negotiation without introducing major additional delays in the rulemaking proceeding. Another advantage of convening a committee after publication of the NOPR is that the NOPR provides a fairly unambiguous indication to the participants of the likely outcome of the rulemaking if a negotiated agreement is not reached. In some cases, this may provide the necessary motivation for compromise.

Therefore, I suggest that the bill be revised to state explicitly that a committee can be formed initially, or reconvened, after the NOPR is issued. I would recommend retaining the requirement for open meetings if the agency receives input from an advisory committee after issuance of the NOPR.

4. Potential for Foot-dragging

Although the potential benefits of negotiated rulemaking are substantial, the process also provides a "footdragging" opportunity for participants. It is important for agencies to maintain sufficient control over the negotiating process to prevent its being abused. I suggest that agencies maintain such control by setting deadlines at the time the committee is constituted for both the committee's report and publication of the NOPR, in the event the negotiation takes place before issuance of the NOPR. This would make it clear to participants that the train is definitely leaving the station and will leave without them if they're not on board at departure time. Certainly, agencies should have the ability to modify deadlines if unexpected difficulties arise, but rulemaking committees should have a firm indication that, after a reasonable period of time, their mandates will expire and the agency will proceed without them.

3/ Whether or not these changes are implemented, I recommend that the bill address the concern some agencies have had that the FACA might apply to caucus meetings of interest groups within a negotiating committee. (See ACUS Recommendation 85-5.) Given that this legislation specifically addresses the applicability of the FACA to negotiating committees, Congress should not fail to assure agencies that caucuses and other working group meetings are not covered by the FACA.

5. Challenges to a Negotiated Rule on Judicial Review

One of the goals of negotiated rulemaking is to minimize the likelihood that a rule will be delayed or overturned as a result of judicial review, and that agency resources will have to be spent defending the rule. As drafted, the bill addresses this concern only indirectly, by seeking to assure that all interests are represented on the negotiating committee.

The negotiated rulemaking mechanism envisaged by the bill provides little assurance that advisory committee members will not follow a two-track strategy of bargaining in the negotiation to obtain a favorable rule and then attacking the rule on judicial review if the agency adopts it. Committee members should be required to state any objections to the recommended rule at the time of the committee's report or waive all objections to the recommended rule if the agency finally adopts it.

Another concern is flushing out objections to the rule that non-participants in the negotiation may have prior to agency adoption of the rule. Opponents of a regulatory initiative may designate one of their number to negotiate with the agency and another to litigate whatever comes out of the negotiation. Agencies probably can deal with this problem under existing law. If the negotiated rule is published as an NOPR, then non-members of the committee must object during the comment period or risk being barred from challenging the rule on judicial review. If negotiation occurs after issuance of the NOPR, then interested persons must either be given an opportunity to participate in the negotiation or to comment on its outcome. However, I would suggest some further study of this question by ACUS and a report back to this Committee.

6. New Requirements that Make Negotiated Rulemaking More Cumbersome

Some provisions of the bill suggest to me that the goal of providing a framework for negotiated rulemaking has achieved an unnecessary preeminence over the goal of encouraging negotiated rulemaking, with the unintended result of discouraging its use. For example, Sections 584 and 585 prescribe an elaborate notice and comment procedure for establishing a committee. Is this really necessary? Have there been criticisms of the procedures used to date? Are there not other reasonable, and less time-consuming, ways that an agency might go about establishing a representative committee?

In light of the fact that one purpose of this bill is to encourage experimentation, and another is to encourage the negotiated rulemaking approach, I suggest that Congress avoid

mandating any more structure than is absolutely necessary. After all, any rule promulgated with the assistance of a negotiation committee will still be subject to all the procedural and substantive strictures of the APA.

For the same reasons, I urge the Committee to examine carefully the requirement that a negotiated rulemaking committee approve the facilitator (i.e., chair) selected by the agency. In my view, agencies should be trusted to select skillful, unbiased facilitators. Allowing the negotiators to second-guess the choice of a facilitator sets the stage for an unnecessary power struggle on the committee and provides an opportunity for delay before a committee even begins to function.

In a similar vein, I question the value of the requirement in Section 583(b)(2) that any recommendations of an agency's convenor "shall" be made available to the public upon request. How is an agency to receive a candid assessment of the potential for a negotiated rule, and honest recommendations as to who would most effectively participate in the process, if the convenor's report is not confidential? I would delete this provision.

7. Inadequate Funding

The suggested level of funding, $500,000 annually, is probably insufficient to fund more than two or three regulatory negotiations a year, and to provide support for ACUS' own effort in this area. The funding should be increased with the direction, noted above, to provide funding for innovative negotiated rulemaking procedures as well as for the procedure laid out in the bill.

C. Technical Issues

Finally, I have a few technical observations that do not go to the substantive effect of the bill but rather to the mechanics of its operation.

1. Agency Representative

Section 586(b) requires that the person or persons representing the agency "shall be authorized to fully represent the agency in the discussions and negotiations of the committee." This language suggests that the representative be authorized to "cut a deal" on behalf of the agency, which in most cases will be a legal impossibility. Certainly the agency should be represented by senior staff with a reasonable degree of insight into what outcomes would be acceptable to the ultimate decision maker(s). However, no staff person can speak for the administrator, administrative board, or commissioners of an agency without a specific delegation of authority. For some agencies, such a delegation is impermissible.

2. "Consensus" Requirement

The bill's consensus requirement is troublesome. It is not clear under § 586(f) whether the advisory committee can report a substantive recommendation to the agency at all if it fails to attain 100 percent consensus. Nor is it clear under § 582(2) whether or not the Committee must have a 100 percent consensus in order to modify the 100 percent consensus requirement. Section 586(f) should be modified to permit the agency to waive the consensus requirement in order to receive a majority report from a committee that cannot reach a consensus. In addition § 582(2) should be modified to make it clear that the committee itself, by majority vote, may report out a nonconsensus recommendation. The agency, of course, would be free to accept or reject such a recommendation.

3. "Interest"

Under § 582(5) "interest" is defined as "multiple parties which have a similar point of view...." The definition does not admit of the possibility that a single party may have a unique interest that requires representation on the committee. For example, in an environmental rulemaking, the manufacturer of the only technology capable of meeting a proposed emission standard should be given a seat at the table, even if no other participant has a similar interest.

4. Conflicts

Section 588(d) provides that the receipt of funds under § 589 will not "conclusively determine whether that member is a federal employee" for purposes of Federal conflict of interest laws. Section 589 provides, among other things, for reimbursement of members' travel expenses. Section 588(d) should be amended to make clear the status of committee members under Federal conflicts rules. In particular, the receipt of travel expenses and other out-of-pocket costs should not subject a committee member to Federal conflict of interest rules.

IV. Conclusion

I believe that the Committee should consider modifications to H.R. 743 designed to provide agencies more flexibility in devising procedures for regulatory negotiation and more funding to carry out innovative regulatory negotiation procedures. The Committee should also resolve the various technical problems with the bill.

Mr. FRANK. Mr. Hitchcock.

STATEMENT OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT

Mr. HITCHCOCK. Thank you, Mr. Chairman. I'll summarize the statement which I have submitted.

Mr. FRANK. It will be put in the record.

Mr. HITCHCOCK. I've been asked to appear here today to give some perspective from a consumer group standpoint of what the negotiated rulemaking is like since I took part in the flight duty time rule negotiations that Mr. Eisner described, which he said were quite successful, and I would agree with that assessment.

I want to make three general points. First of all, I would agree with some of the earlier statements that negotiated rulemaking can be helpful if it's properly understood and properly applied, but I think only in some limited settings. I think it's important that the concept not be oversold. The second general point is that I don't really see the need for having a bill. Criticisms from the agencies and the letters in Mr. Breger's testimony say, in effect, as I read them, "We don't want to set up advisory committees or go through negotiated rulemaking because we'd have to comply with the Advisory Committee Act, and we don't want to do that the way it is written now."

The bill as it is now drafted does not give them relief from that. I don't think it should. I think the bill takes the right approach, and I also think the concerns about FACA are somewhat overstated. I'd say, "Try it, you'll like it," and FACA can be administered in a rather pragmatic standpoint.

Mr. FRANK. That acronym, FACA, what is it, for the record?

Mr. HITCHCOCK. FACA is the abbreviation for Federal Advisory Committee Act. The third point I'd make is that if Congress nonetheless does move forward with the bill, I think H.R. 743 does a good job of responding to the concerns that were made in the last Congress, and I've got some specific additional recommendations that are covered in the prepared statement.

Let me be a little more specific. Why is negotiated rulemaking useful in only limited settings? I think it's important to dispel the idea that if everyone just sat down and talked about the issues, they could be resolved. The reason why Congress passes a statute in the first place is usually because certain problems are not being resolved in the private sector and through cooperative ventures.

So as a practical matter, there are lots of issues where the differences are simply too great, and the agency has to say "We're going to do it this way and not the other way," and somebody wins and somebody losses. I think every student of the process recognizes that fact, but I think if Congress is going to be giving its endorsement to the concept, it has to make it clear that certain situations have to be present. They are discussed in the ACUS recommendation, such as issues being ripe for action and the like.

The other thought I would add is that you have to have a situa-

ticipants can delay and drag out activity, and the incentives to stonewall remain fairly high.

Having said that, in certain situations, negotiated rulemaking can work. I think the greatest value of negotiated rulemaking is that it gives an agency insights into how to do rules and how to make them work properly.

In the FAA rulemaking, the agency had tried on two or three occasions to come up with its own rule, and it crash-landed each time. People were shooting at it from both sides, and regulatory negotiation gave the agency a chance to figure out how to do a rule that will work. The other thing, of course, is that regulatory negotiation gives the agency some political information about who is really for it, who is against it, what can they live with, what they're going to go screaming to the Hill or the Secretary or to OMB about. That can be useful, in some senses, from the agency's standpoint, but I'm not sure if you've got a statute that talks about regulating the highest degree of safety or something like that, there may be times when you're going to have to make people mad, and maybe it's not useful in that setting.

The third general area I'd cover is some of the specifics of the bill. For example, the findings, as I pointed out, I think are broad and state the case a little too enthusiastically. With respect to your questions about what's consensus, I think it's like the famous definition of obscenity; you know it when you see it. In the FAA setting, the situation ended up where there were three issues that were unresolved and left to the Administrator, but there wasn't significant opposition. People were not going to the Secretary, going to OMB, going to the Hill saying don't do this. I think sometimes the absence of that opposition signifies when you have consensus.

We also support compliance with the Federal Advisory Committee Act. I think, as I indicated earlier, it can be applied in a rather pragmatic sense. It's been interpreted that way by the courts. The problem that you face is what happens if people want to go out to lunch together and talk about the issues: Is that a subcommittee or subgroup? Those kinds of issues will sort themselves out in the ordinary course of events, and I think that the goals of the Advisory Committee Act of having a balanced representation and as much openness as possible are very important to the process, in my experience.

There are provisions under the statute for closing meetings if you need to, using the Sunshine Act provisions. I think it can work and it should work. There was mention also of the per diem and travel reimbursement. That's very important, too. These can take a lot of time if people are coming from outside of Washington, and that can really mount up in terms of cost.

One issue that the bill doesn't address that I think is going to be very important here is what role would the Office of Management of Budget play in these types of negotiations. Public Citizen has been critical in the past of OMB's involvement in various regulatory activities where OMB has urged agencies to water down a particular rule or not to regulate in a certain area. What you have to

tunity for groups to make an end run around the negotiation to someone higher up in the Department or OMB or the Hill.

In the FAA situation, OMB was supportive of our efforts and we were basically given the signal early on that if we reach consensus, OMB is going to go along with it and we are not going to have problems from that standpoint. But I'm not sure that's going to be the case in every situation. If one is going to be legislating a bill, one needs to focus on that particular issue. If the affected industry group realizes or perceives that it can go running to OMB to get relief from whatever is going on, if it doesn't like what's happening in the negotiating committee, the process is not going to work terribly well.

So that's why we have set forth several suggestions in the testimony, either cutting OMB out of the process of reviewing any rules that come up through this manner, or else publicizing any communications that they make or something of that nature, or else limiting the review process to, say, 14 days. That covers fairly quickly the points I wanted to make, and I'd be happy to take your questions.

[The prepared statement of Mr. Hitchcock follows:]

STATEMENT OF CORNISH F. HITCHCOCK,
ATTORNEY, PUBLIC CITIZEN

before the
Subcommittee on Administrative Law
and Governmental Relations
of the
Committee on the Judiciary
U.S. House of Representatives

Washington, D.C.
3 May 1989

Mr. Chairman, members of the Subcommittee:

On behalf of Public Citizen, I appreciate the invitation to testify on H.R. 743, the Negotiated Rulemaking Act of 1989.

By way of background, Public Citizen is a non-profit consumer organization with over 50,000 members which was founded by Ralph Nader in 1971. I am a lawyer with Public Citizen Litigation Group, and I also serve as legal director of the Aviation Consumer Action Project (ACAP), another consumer group which Mr. Nader founded. It is in that latter capacity that I am here today. I was ACAP's representative in the first regulatory negotiation tried by a federal agency, namely, the Federal Aviation Administration's effort to rewrite its rules limiting flight time and duty time of commercial airline pilots. That negotiation, which is generally regarded as a success, resulted in new rules which took effect in 1985, and it served as a model for other efforts at negotiated rulemaking. This testimony is based on my experience in that process, discussions with participants in other negotiated rulemakings, and my review of the record generated in hearings on similar bills in the last Congress.

Let me make three general points.

First, negotiated rulemaking, if properly understood and properly applied, can be useful in some limited settings. It

should not, however, be oversold. Nor should it be seen as a general cure to problems associated with "informal" rulemaking under 5 U.S.C. § 553, i.e., rules which are adopted not through trial-like evidentiary hearings, but after the agency has proposed a rule, given the public an opportunity to comment, and considered those written comments in reaching its final decision.

Second, it is difficult to see what enacting a bill such as H.R. 743 would accomplish in practical terms. Unless there is a statute which somehow limits a specific agency's rulemaking power under 5 U.S.C. § 553, there is no legal barrier to using negotiated rulemaking in that setting, assuming that the agency complies with the Federal Advisory Committee Act. Also, regulatory negotiation is not the novelty it was a few years ago, and much information is now available to an agency wishing to give it a try.

Third, if Congress should nonetheless decide that legislation is desirable here, H.R. 743 does a good job of responding to the concerns of consumer organizations raised during last year's hearings, and I will add some specific comments later.

Let me begin by explaining why regulatory negotiation is useful in only limited settings. On the surface the idea has a certain appeal. After all, how can one object to the concept of people who represent opposing interests sitting down and trying to work out a mutually satisfactory solution? At the risk of answering a question with a question, one must ask why did Congress decide initially to regulate a certain area. I submit that a demand for regulation arises when citizens perceive that various problems affecting economic justice or public health and

safety are not being solved in the marketplace or through cooperative efforts by affected parties. The industry or other entity that is the subject of these complaints will generally deny that any problem exists or argue that any problems can be solved without legislation. If Congress nonetheless passes a regulatory statute, the affected industry or other entity will generally have to do things that it would not do if left to its own devices. Thus, by its very nature, the rulemaking process often makes one group happy and leaves another group dissatisfied.

I make these rather basic points because it is important to debunk any "hot tub" notions one may entertain about regulatory negotiation, and every student of the process has emphasized this point. It is fanciful to imagine that problems with the rulemaking process would be solved if only the agency could sit everyone down and try to hammer out a solution. In the real world, that will not happen because basic differences may be too great. The negotiation process could also produce results at odds with the agency's mission. Negotiated solutions tend to be compromise solutions, and such compromises may conflict with a statutory command that an agency insist on the "best available technology" or the "highest degree of safety."

Having said that, I believe that in the right circumstances, regulatory negotiation can give an agency useful information which it might not obtain through traditional notice and comment rulemaking, thus improving the quality of the final rule. This is no small benefit. Agencies may lack the in-house technical expertise which is possessed by the regulated industry, yet which

is essential to successful rulemaking. The notice and comment system gives participants an incentive to state their own case strongly and to lambaste proposals from opposing parties, but there may be inadequate incentives (particularly for the regulated industry) to set out a middle course or to explain why, if the agency is going to adopt a rule, it makes more sense to do it one way rather than the other. Conceivably agencies could get this sort of information now if they supplemented the written rulemaking process with oral argument or legislative-type hearings at which parties have to answer each other's points directly, but such practices have not generally been followed.

Regulatory negotiation can thus give agency officials practical insights about how to craft a rule which might not be gleaned from written comments. The negotiating process can also yield useful "political" information, inasmuch as the agency can gauge how strongly a group feels about each issue and whether a group can live with a particular approach even if the group cannot endorse it directly. This happened during the flight/duty time negotiations, where we failed to achieve consensus on some issues, which were left to the Administrator to decide. From the agency's perspective, the discussion can still be useful because it gave officials an idea of what positions were politically safe and which ones would lead to phone calls from the Secretary's office, letters from the Hill, a lawsuit to overturn the final rule, or similar measures.

From the agency's perspective, such insights are undoubtedly useful, but there is a risk that the agency will take the path of

least resistance even when stronger measures may be required to address the specific problem before it. Perhaps the answer to this concern is that the agency will recognize divisive issues which are simply not amenable for negotiated rulemaking, but it is a risk which must be acknowledged.

Having identified the limitations of negotiated rulemaking generally, one must ask: When can it be used effectively? The criteria set forth in the 1982 recommendations of the Administrative Conference of the United States (ACUS) provide excellent guidance, focusing on such factors as whether the issue is mature, whether the issues to be negotiated would require any party to compromise basic principles, and whether there are a number of diverse issues on the table, thus making trade-offs possible (again, assuming that such trade-offs are permitted under the governing statute). My experience during the FAA negotiations convinced me that each of these elements must be present if the agency is going to have any chance of success, and I would add two others: (1) The agency must make clear its intention to "do something" at the end of the process, regardless of whether the negotiation succeeds or fails; (2) It must set a deadline. Absent such commitments, which give everyone an incentive to take part and which avoid undue delays, the entire process would be an enormous waste of time.

These are the reasons why I believe that regulatory negotiation can play a limited, but useful role in informal rulemaking. The question then arises: What should Congress do, if anything? Frankly, the record compiled during last year's hearings makes a

less than compelling case for Congressional action. We are told that legislation would be useful to give agencies concrete guidance about what negotiated rulemaking is all about and when to consider it. But is there really a shortage of such data? The Justice Department has offered seminars for agencies on this topic; if there is the need for any "guidebook," it should not be too difficult for ACUS or another agency to put one together without Congress going through the trouble of passing a new law.

The point was also made that some agencies do not think they have legal authority to engage in negotiated rulemaking, and concern was expressed about how negotiated rulemaking would proceed under the Federal Advisory Committee Act. Unfortunately, the record is vague on this point; we are not told which agencies think they might get in trouble or what the legal basis is for their concern. There is no barrier to negotiated rulemaking under the Administrative Procedure Act, and I suspect that, apart from the novelty of the negotiation process, much of the resistance may stem from traditional agency reluctance to going through the steps of convening an advisory committee under FACA.

For all these reasons, then, it is not clear that legislation is really necessary, and I am skeptical that H.R. 743 would accomplish very much in practical terms beyond assuring agencies that yes, they can try this approach as part of their informal rulemaking process if they really want to, provided that they understand the limitations of the process. I would thus leave it to the Subcommittee to decide whether the limited gain is worth the effort. I would add, however, that if you do decide to move

forward, H.R. 743 generally does a good job of addressing the key issues and responding to the concerns which were voiced in the last Congress. I would offer the following specific comments for your consideration.

Findings. To avoid confusion, the Findings should clearly state that the focus here is on informal rulemaking under 5 U.S.C. § 553, not trial-type hearings which may be required under some agencies' organic statutes, where negotiations would make no sense and may be unlawful. While there is an allusion to section 553 in proposed section 581, my experience suggests that it is useful to make the point more explicitly. I also have the more general concern that the Findings tend to oversell the negotiated rulemaking process for reasons stated above, and I would suggest that some limiting language be added to paragraph (4).

Proposed § 581 states that the bill is not an attempt to limit innovation or experimentation in this area; it may be useful to add a sentence stating that the law should not be construed as an attempt to endorse negotiated rulemaking in situations where the agency believes it would be inappropriate.

Proposed § 582 tries to define "consensus," which everyone recognizes is an elusive concept. The subject was well treated in the 1982 ACUS study, which H.R. 743 draws upon. I would cite an additional thought based on the FAA negotiations, where "consensus" appeared to be the lack of significant opposition to a particular proposal, and I would define "significant" as meaning troublesome enough that a party feels compelled to try and torpedo the rule. As I am sure you know from experience,

there may be times when groups cannot endorse a proposal outright and may even speak against it, but they will not try to kill it. I do not know if it is worth tinkering with the statutory definition to accommodate this concept, but it is worth keeping in mind in drafting any bill or committee report.

Proposed § 583 lists some factors which an agency must consider in deciding whether to undertake a negotiated rulemaking or not. I would suggest that the factors identified in the ACUS recommendation also be incorporated to the extent they are not there already. I would also recommend adding the points I mentioned earlier, namely, that the agency must be committed to taking regulatory action at the end of the process and that it must set a deadline.

Proposed § 585 requires compliance with the Federal Advisory Committee Act, as is presently the law. This is as it should be. The argument has been made that FACA would unduly inhibit the discussion of issues, but agencies have been saying that about FACA ever since it was enacted 17 years ago. My experience in the FAA negotiations suggests that this concern is overblown. To be sure, there were times when some committee members met privately with the mediator, just as there were times when participants got together for lunch during off-weeks to discuss differences. FACA is a broadly written statute that must be read in a sensible, pragmatic fashion, and I doubt that a court would construe FACA as covering those situations. I would note, however, that FACA has been construed as not covering subgroups established by an advisory committee; to the extent that sub-

groups are created to discuss specific issues and to the extent they do so in the same way as the plenary group, the bill could be amended to address this issue.

Proposed § 587 wisely provides for reimbursing negotiators for their travel and per diem expenses if the need can be shown. This is very important because negotiated rulemakings can be very time-consuming and, if the meetings are held in Washington, very expensive for out-of-town participants. During the FAA negotiations we had 16 plenary sessions, plus a number of informal sessions in between. I know that this took more time than a group such as ours would spend on preparing traditional comments; I suspect that it is also more time than we would normally spend on preparing comments and on litigating over the validity of a rule if we saw a basis for doing so. In hindsight, the FAA talks may have taken longer than was strictly necessary because it was the first such venture, but even if agencies place deadlines on this process, there is a limit to how many negotiations a group can undertake, especially if it must absorb all the costs itself.

Proposed § 589 names the Administrative Conference as the lead agency, which makes sense given its work in the field, and one would hope that any funds which they receive under this bill would be directed at all the activities listed in this section.

Proposed § 590 states that a regulation which is the product of negotiated rulemaking and which is challenged in court "shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures." This is a useful provision because it tacitly acknowledges that regulatory

negotiation is a means of acquiring information, not shielding the outcome of that negotiation and any subsequent review by the agency head from the normal strictures of judicial review.

One issue which H.R. 743 does not address is what role, if any, the Office of Management and Budget should play. Public Citizen and other consumer and environmental groups have criticized OMB's interference with the regulatory process and its past efforts to water down or prevent the issuance of various health and safety rules. This concern was explicitly raised at the start of the FAA negotiations, and we were all assured that OMB (which had endorsed the regulatory negotiation concept) would not be a barrier if the committee could reach a consensus.

That may not be true in every case, however. If regulatory negotiation is going to succeed, there must be an assurance that regulations which emerge from that process will not be torpedoed by OMB. This is important becauee if industry groups perceive that they can "end run" the negotiation process by appealing to OMB for relief, the negotiatione will be a waste of time and will be regarded as such. Thus, the Subcommittee should consider an amendment which either cuts OMB out of the review process or which requires OMB to make public any communications it has on an issue which is the subject of negotiated rulemaking, along with its communications to the agency about the content of the rule. Also, OMB review could be limited, say, to 14 daye, after which point the agency would be free to issue the rule in question.

Thank you for your consideration of these comments. I will be happy to respond to any questions.

Mr. FRANK. Thank you. Let me start with the last one. I think there are some serious issues that are raised by OMB's role in the regulatory process generally. I've participated in some checking into the Government Operations Committee, but I think it is a bigger issue than this one. That is—you would agree, that concerns you whether or not there's regulatory negotiation going on. So I don't think—and you correct me and people shouldn't overstate this, though—to make it the vehicle for resolving that border issue I think would be counting on an inflation of its importance.

At that point, if we get into the question of whether or not we're going to limit OMB's role, everybody would forget about regulatory negotiation because everybody would only care about OMB. I think we have a responsibility as a subcommittee to look at that, but I do believe that to be separate. The one area where I disagreed with some of what you said; you said there was no need for a bill. I was more persuaded by what Mr. Pease said today and I, frankly, think that we can do a bill here. Nice people want it, some of them are in the Senate, we negotiate with them a lot. In the interest of reaching a consensus with my counterparts with whom I have a lot of common business in the Senate, this bill isn't going to hurt anybody.

But when Mr. Pease points out that we now have authorizing committees going off on their own legislating here, I think we probably do have a responsibility to do something and have some general rules. I mean, if it's going to be—and it's hard for us to say to this authorizing committee, Labor or that one at the Banking Committee, don't do it at all if we haven't done anything and the agencies are going to come to them and say, well, we've got these concerns and I think having a proliferation of those would be wrong. So that inclines me to that view.

Beyond that, I just want to ask both of you only one other question and that's on the whole question of the ability of people to talk in other than a purely open forum. Mr. Nordhaus, you suggested that we might want to amend the rule, one, to make it easier to close meetings and, two, to allow informal conversations between or among subparts of the group. My inclination would be with those, to be honest. I would be reluctant to allow the whole meeting to get closed. On the other hand, since there is a requirement for a consensus which we are agreeing is a lot more than just a majority, I see less danger here in allowing a few people to go off on their own and talk.

Since the people who are excluded, if they were mightily unhappy, if there were three or four of them, would have the power to prevent this thing from reaching conclusion. So let me start with you, Mr. Hitchcock. Have you got a problem if we made it explicit that you could have these kinds of informal huddles and caucuses as long as the basic principle that ultimately nothing came except by consensus was maintained?

Mr. HITCHCOCK. I think it might be tricky to write, but I think it has to happen as a normal part of the process. When we did the FAA negotiations, there were times when the mediator would go off and talk to the labor people, they go off and talk to the industry people.

Mr. FRANK. You don't see any problem with that.

Mr. HITCHCOCK. No. Can I put it in perspective? The real problems you're going to get into in terms of advisory committees and open and closed is the question of whether you've excluded somebody in the first place. If everybody is on board——

Mr. FRANK. Mr. Hitchcock, people make me crazy when they answer questions I didn't ask.

Mr. HITCHCOCK. OK.

Mr. FRANK. Because then I don't remember what I asked. I understand that and we'll get back to that. You can always volunteer something. So I would agree that it may be tough to write, but I think we can—there's a combination of report writing and other things. So let's say, Mr. Nordhaus, we now have agreement on that; that there really ought to be the normal—I mean, basically what we're saying is just because you're off on something called a committee doesn't mean you shouldn't talk to each other like normal human beings in other than the purely formal setting.

But if we were to do that, would it be necessary, in your judgment, to go beyond the current exceptions that allow you to close a formal committee meeting? That's just going to raise a lot of hassles is one of the problems.

Mr. NORDHAUS. I think that the key thing—on reflection—is to give the facilitator the ability to talk privately with participants. They can do that and I think that he or she will know what participants' positions are and how to guide them to a consensus in an open meeting.

Mr. FRANK. I think I now know what a consensus is.

Mr. NORDHAUS. Can I say something on the consensus point?

Mr. FRANK. Sure.

Mr. NORDHAUS. I think the key thing on the consensus point is—in fact, the key feature of the bill and the whole approach—is that there's a commitment by the agency, if there is a consensus, to issue the consensus as a proposed rule.

Now, it seems to me that that commitment should exist only if you've got everybody on board. The important point is that if you don't have everybody on board, there should be a mechanism for the committee to give the agency a majority report which the agency can choose to accept or not. I think that's important for two reasons.

One is the agency needs the information——

Mr. FRANK. But it would be clear that it would not be the consensus and it would have less weight if it——

Mr. NORDHAUS. Right. And it puts pressure on the other participants to get on board on a consensus, if they know the majority is going to give something to the agency anyway that the agency may——

Mr. FRANK. Those are reasonable suggestions and I think, Mr. Hitchcock, they strengthen my view that there would be some gain to our writing the properly drafted statute with a very good committee report and some good language so that we can prevent this from going off in—because I think you might otherwise have a situation in which there would be a 10-percent or 15-percent difference from agency to agency and it could make it very difficult for people. I gather, also, that you would think that our giving approunder the conflict law who got it, that would also help us broaden the reach of this because you would then be getting to people who couldn't otherwise afford it.

In this case, expenses are an important part of the reach. I have no further questions. Mr. Douglas asked me to pass on that he is somewhat concerned about the costs and I think that that's going to be a shared concern. That is if this is going to have too much of a price tag, it's going to bog it down and we may have to make this purely an option for the agencies and hope they'll want to use it, but not in the short term be able to compensate.

I have no further questions. This has been a very short hearing, but a very useful one. It also illustrates, I think, one of the advantages here. One of the things that—this is now the second hearing that we've had and there is a pretty good network in this town of knowing what's going on. We were not swamped with insistent demands that we either call off the hearing or take statements before other people be allowed to testify, which leads me to believe that there is not an enormous amount of opposition if we do this right.

So the fact that this is a fairly clean-cut hearing is itself a datum and I think it might mean that we will be able to draft a statute that takes into account most of the suggestions we've had and will give people a reasonable and reassuring model. I appreciate all of you appearing and the hearing is adjourned.

[Whereupon, at 11:04 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

○